IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MARGARET A. DUNNING and	:	
CHRISTOPHER DUNNING,	:	
	:	C.A. No. 98C-02-045
Plaintiffs,	:	
	:	
v.	:	
	:	
SIDNEY B. BARNES, M.D. and	:	
BOLASNY, GLENN & BARNES,	:	
M.D.'s, P.A.,	:	
	:	
Defendants.	:	

Submitted: September 30, 2002
Decided: November 4, 2002

ORDER

Upon Plaintiffs' Motion for a New Trial. Denied.
Upon Defendants' Motion for Costs.
Granted in part; denied in part.

Stephen A. Hampton, Grady & Hampton, P.A., Dover, Delaware, Attorneys for the Plaintiffs.

Susan A. List, Tybout Redfearn & Pell, Wilmington, Delaware, Attorneys for the Defendants.

WITHAM, J.

I. Introduction

Before this Court is Plaintiffs' Motion for a New Trial and Defendants' Motion for Costs. Upon consideration of the motions and responses, Plaintiffs' motion for a new trial is ***denied*** and Defendants' motion for costs is ***granted in part; denied in part.***

II. Background

On April 23, 1996, Sidney B. Barnes, M.D. performed a laparoscopic cholecystectomy during the removal of Margaret Dunning's gall bladder. During the surgery Dr. Barnes accidently transected the common bile duct instead of the cystic bile duct. Dr. Barnes testified that the appropriate standard of care for performing such a surgery required identifying the cystic duct and the cystic artery with reasonable certainty before clipping and transaction began, and that if a doctor is suspicious that he is not dealing with the cystic duct then the appropriate steps to remedy the problem could include (1) more dissection to identify the anatomy, (2) cholangiogram, or (3) conversion to an open procedure.

Plaintiffs' expert, Dr. Goldstone, explained each of the alternate approaches that could be utilized to make a positive identification of the cystic duct. Dr. Goldstone explained that proper dissection involves identifying the Triangle of Calot. Dr. Barnes testified that he placed a fifth port in Ms. Dunning in order to see the Triangle of Calot. Then he testified that he completed the dissection in order to identify the cystic artery and the cystic duct. Unfortunately it was later learned that Dr. Barnes actually cut the common bile duct instead of the cystic duct. Further,

there was testimony that mistakenly transecting the common bile duct is a known complication of the surgery and one that can occur without malpractice.

On October 22, 2001 to October 31, 2001, this malpractice suit was tried before a jury. On October 31, 2001, the jury returned a verdict for the defendants. Plaintiffs then filed this Motion for a New Trial claiming that the "alternate approaches" jury instruction[1] was not supported by the evidence. The Motion for a New Trial was continued pending the outcome of a similar issue concerning the alternate approaches jury instruction that was raised in the Supreme Court case of *Corbitt v. Tatagari*. *Corbitt* was decided on August 16, 2002, and the parties filed their supplemental responses by September 30, 2002.

III. Analysis of Plaintiff's Motion for New Trial

Pursuant to Superior Court Civil Rule 59 "a new trial may be granted as to all or any of the parties and on all or part of the issues in an action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in the Superior Court." In this case Plaintiffs claim that a new trial should be granted because the alternate approaches jury instruction was not supported by

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[1] The "alternate approaches" jury instruction reads as follows:

> Where there is more than one recognized approach and no one of them is used exclusively and uniformly by all practitioners of good standing, a physician is not negligent if, in the exercise of his best judgment, he selects one of the approved methods which in hindsight might be a wrong selection or one not favored by other practitioners. Stated otherwise, when a physician chooses between appropriate alternative medical approaches, harm which results from physician's good faith choice of one proper alternative over the other, is not malpractice.

the evidence; thus, was given to the jury in error.

This Court will turn first to the issue of whether this jury instruction was supported by the facts of this case. "The decision whether a litigant has produced sufficient evidence to warrant a requested instruction is a matter within the sound discretion of the Trial Court and will not be disturbed, absent an abuse of discretion."[2] Plaintiffs admit that there was testimony concerning the three alternate approaches that a doctor could choose from in positively identifying the cystic duct. However, Plaintiffs assert that there is no testimony that Dr. Barnes used an inappropriate approach during the gall bladder operation. In addition, Plaintiffs contend that the dispute is not whether there were alternate approaches available to Dr. Barnes, but rather the dispute was his failure to use any of these approaches.

Despite Plaintiffs' contentions it does appear that there was enough evidence in the record to support the alternate approaches jury instruction. In order to perform a gall bladder surgery the doctor must positively identify the cystic duct and the cystic artery with reasonable certainty before clipping and transaction began. Testimony was given that in order to positively identify the cystic duct the surgeon may dissect down to the cystic duct and visually identify the anatomy. If the surgeon is suspicious that they are in fact not dealing with the cystic duct the doctor may further dissect to the Triangle of Calot, perform a cholangiogram, or convert to an open procedure.

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[2] *McNally v. Eckman*, 466 A.2d 363, 370 (Del. Supr. 1983).

Dr. Goldstone explained each of the alternate approaches; however, he testified that there was no indication that Dr. Barnes utilized any of the three approaches. However, Dr. Barnes testified that he placed a fifth port in Ms. Dunning in order to see the Triangle of Calot. Then he testified that he completed the dissection in order to identify the cystic artery and the cystic duct. While this Court agrees with the parties that whatever approach the doctor used was not a central issue in this case, there seems to be more than enough evidence to support the jury instruction.

Nevertheless, even if the jury instruction was not specifically tailored to the facts of the case, this fact alone does not necessarily warrant a new trial.[3] The standard for determining if a jury instruction is proper is "not whether any special words were used, but whether the instruction correctly stated the law and enabled the jury to perform its duty."[4] In *Corbitt v. Tatagari* the Supreme Court explained that:

> Generally, jury instructions must give a correct statement of the substance of the law and must be 'reasonably informative and not misleading.' The instructions need not be perfect, however, and a party does not have a right to a particular instruction in a particular form. In evaluating the propriety of a jury charge, the instructions

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[3] *See Corbitt v. Tatagari*, 804 A.2d 1057 (Del. 2002). In *Corbitt* the Court determined that even though it might have been more appropriate to eliminate the alternate approaches jury instruction, the instruction was not so unsubstantiated by the facts as to render the inclusion of the instruction reversible error.

[4] *Cabrera v. State,* 747 A.2d 543, 545 (Del. 2000).

must be viewed as a whole."[5]

Furthermore, the Supreme Court specifically approved the alternate approaches jury instruction.[6]

In the case at bar, the instruction in question was minor in context of the entire jury charge. Furthermore, the jury instructions given are a correct statement of the law. The instructions informed the jury of the statutory definition of malpractice. Moreover, as noted above, the Supreme Court has specifically approved the alternate approaches instruction as being a correct statement of the law.

Plaintiffs further argue that the instruction could have mislead the jury because the jury may have concluded incorrectly that because Dr. Barnes' approach was accepted he was not liable for malpractice even if he was negligent in executing his approach. A similar argument was rejected in *Corbitt*.[7] Corbitt argued that many states have abandoned similar instructions because they tend to excuse any physician acting in good faith. However, the Supreme Court explains that Delaware's alternate approaches jury instruction "speaks of 'appropriate' and 'proper' alternatives, not any alternative that exists . . .this distinction, in conjunction with the remainder of the charge, adequately conveys to the jury that

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[5] *Corbitt*, 804 A.2d at 1062.

[6] *Id.* (citing *Riggins v. Mauriello*, 603 A.2d 827, 829-31 (Del. 1992)).

[7] *Id.*

the given alternatives must themselves be reasonable and must meet the standard of care." Given the language in *Corbitt*, and the fact that there is no specific indication that this jury was mislead, this argument by the Plaintiffs fails as well. Consequently, the Plaintiffs are not entitled to a new trial because of the fact that this instruction was given.

IV. Analysis of Defendant's Motion for Costs

A. Superior Court Civil Rule 54 (d)

10 *Del. C.* § 5101 provides that "[g]enerally a party for whom final judgment in any civil action . . . is given, shall recover, against the adverse party, cost of the suit, to be awarded by the court". Specifically, Defendants claim that it should be awarded costs for its expert witness fees pursuant to Superior Court Civil Rule 54(d) and 10 *Del. C.* § 8906. Superior Court Civil Rule 54(d) provides:

> Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs.

10 *Del. C.* § 8906 provides:

> The fees for witnesses testifying as experts or in the capacity of professionals in cases in the Superior Court, the Court of Common Pleas and the Court of Chancery, within this State, shall be fixed by the court in its discretion, and such fees so fixed shall be taxed as part of the costs in each case and shall be collected and paid as other witness fees are now collected and paid.

However, a decision of whether or not to grant costs to the prevailing party is within

the sole discretion of the Court.[8] In *Russo v. Medlab Clinical Testing, Inc.*, the court stated that the term costs is open to interpretation because 10 *Del. C.* § 5101 uses the word "generally."[9] Therefore, the court stated that "because of this statutory language, final judgment 'does not necessarily lead to costs being awarded to the prevailing party.'"[10] The court further stated that at times "it is right and just and fair for the defendant to bear the defense cost burden of the successful defense."[11]

First, Defendants request costs concerning the transcription of Dr. Goldstone's and Dr. Barnes' deposition testimony. The reimbursement for expert testimony encompasses deposition testimony which is introduced into evidence as well as trial testimony.[12] Superior Court Civil Rule 54(f) provides that "fees paid court reporters for the Court's copy of transcripts of depositions shall not be taxable costs unless introduced into evidence. Fees for other copies of such transcripts shall not be taxable costs." Thus, as long as the transcript from the deposition testimony was admitted into evidence, then the cost of preparing the transcript may be recoverable. Here, Defendants are asking for costs concerning the transcription of three deposition testimonies—(1) $961.99 for Dr. Goldstone's 1998 deposition; (2)

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[8] *Broderick v. Wal-Mart Stores*, 2002 Del. Super. Lexis 62.

[9] *Russo v. Medlab Clinical Testing, Inc.*, 2001 Del. Super. Lexis 464, *9 (citing *Donovan v. Del. Water and Air Res. Comm'n*, 358 A.2d 717,722-723 (Del. Supr. 1976)).

[10] *Id.* at *9-*10. (citations omitted).

[11] *Id.*

[12] *Nygaard v. Lucchesi*, 654 A.2d 410, 413 (Del. Supr. 1994).

$1,207.30 for Dr. Goldstone's 2001 deposition; and (3) $236.50 for Dr. Barnes' deposition. After a careful review of the exhibits that were entered into evidence by each party, it appears to this Court that only Dr. Goldstone's 2001 deposition was actually entered as evidence in the trial. Defendants request $1,207.30 as costs for the transcription of this deposition. The amount requested represents 184 pages transcribed at a rate of $6.35 per page, and a Federal Express fee of $38.90. Given the fact that the Kent County transcription fee is $2.75 per page, the rate of $6.35 per page seems excessive to this Court. Thus, to this Court $3.00 per page seems to be a more reasonable rate for this transcription. In addition, the Defendants will not be reimbursed for the Federal Express fees. Consequently, Defendants will be given $552.00 which represents the cost of the deposition transcription.

Second, Defendants request expert witness fees for Dr. Smoot including his actual time on the stand, time waiting to be called to the stand, and travel time. The award of costs for expert witness testimony is committed to the sound discretion of the trial court.[13] In determining reasonable reimbursement for expert costs, the Court must "recognize that a significant disruption to a physician's practice occurs when a physician is called to testify as an expert witness and that such testimony is important to the Court since it assists the trier of fact and serves a significant public interest."[14] Nevertheless, there is no fixed formula to determine reasonable expert

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[13] *Sweren v. Sheehy*, 2001 Del. Super. LEXIS 541, * 3-4.

[14] *Id.* (citation omitted)

fees.[15] In previous cases it has been stated that "when a physician testifies as an expert, for three hours or less, a minimum witness fee should be allowed based upon a flat amount for a one-half day interruption in the physician's usual schedule."[16] According to a 1995 study by Delaware Medico-Legal Affairs Committee, a reasonable range of fees for court appearances for medical experts is $1,300 to $1,800 per half day.[17] Defendants are claiming $3,200.00 for trial testimony and wait time totaling 8 hours. Dr. Smoot only testified for 3 hours at trial. Since this Court recognizes that a physician's time is valuable, this Court will grant costs for one half of a day at a rate of $1,300.

In addition, an expert's reasonable and ordinary traveling expenses may be reimbursed. However, costs should not be accessed at the expert's hourly testifying rate.[18] In a recent case it was held that an appropriate award for 5 hours of travel was $250.00.[19] Defendants claim $800.00 for Dr. Smoot's travel time. This amount seems excessively high for 4 hours of traveling; thus, this Court will reduce that amount to $250.00. Therefore, the Defendants shall receive costs concerning this expert witness in the amount of $1,550.00.

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[15] *Id.* at *3.

[16] *Id.* at *4.

[17] *Id.* at *4-5.

[18] *Russo,* 2001 Del. Super. Lexis 464 at *12.

[19] *See Burns v. Scott*, 1998 Del. Super. Lexis 130.

Finally, Defendants are requesting travel expenses including lodging that were incurred in traveling to New York to depose Plaintiffs' expert, Dr. Goldstone. In *Nygaard v. Lucchesi* the Court dealt with the issue of whether costs should be accessed for travel expenses that were incurred in obtaining an expert witness' testimony.[20] "Travel expenses, including meals and lodging are generally recoverable."[21] Defendants are seeking $140.00 for travel to New York and $317.97 for lodging. Here, since Defendants incurred these expenses in order to depose Plaintiff's expert it seems fair that these costs be reimbursed. Thus, Defendants are entitled to $457.97.

B. Superior Court Civil Rule 68

Superior Court Civil Rule 68 states in pertinent part: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Rule 68 "does not apply where there is a defense verdict, as such a case is not one where there is a 'judgement finally obtained by the offeree . . . not more favorable than the offer.'" Since Plaintiffs did not obtain a verdict, Rule 68 does not apply. Therefore, Defendants can not recover any costs under this rule.

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[20] *Nygaard*, 654 A.2d at 414. In *Nygaard* travel expenses were not ultimately given because both the plaintiff and the defendant had a theory under which they were both entitled to costs. Thus, in that case because they both incurred this cost each party was responsible for their own travel expenses. The case at bar is distinguishable because this plaintiff, unlike the plaintiff in *Nygaard*, has not presented this Court with a theory that would justify them receiving costs.

[21] *Id.*

V. Conclusion

WHEREFORE, Plaintiffs' Motion for a New Trial is ***Denied***. Defendants' Motion for Costs is ***Granted in Part; Denied in Part***. Specifically, the Defendants are entitled to costs in the amount of $2559.97 representing $552.00 (for transcription of Dr. Goldstone's deposition); $1,550.00 (expert witness fees for Dr. Smoot); and $457.97 (travel expenses incurred traveling to get Dr. Goldstone's deposition). Therefore, Plaintiffs shall pay Defendants costs in the amount of $2559.97.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution